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No. 83-2034

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1983

UNITED STATES DEPARTMENT OF JUSTICE,
Petitioner,

v.

EVELYN FALKOWSKI,
Respondent.

SECOND SUPPLEMENTAL BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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SECOND SUPPLEMENTAL BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

This Second Supplemental Brief in Opposition to the Petition for a Writ of Certiorari is filed pursuant to Rule

22.6 of the Rules of this Court. Since the filing of respondent's original Brief in Opposition in this case, this Court has entertained oral argument in the case of Heckler v. Chaney, No. 83-1878, which the Department of Justice alleges in its Petition is a companion case to the instant matter. This Supplemental Brief will address the allegations of the government made upon oral argument which we believe belie the government's effort to link the instant case to the Chaney case.

STATEMENT

The government has taken the position in its Petition for a Writ of Certiorari that this case is similar to Heckler v. Chaney, No. 83-1878, presently before this Court. See, for example, Page 3 of the government's Reply Memorandum

in this case. In its Petition and Reply Memorandum, the government suggested even a consolidated argument upon this case and Heckler v. Chaney. At oral argument upon Heckler v. Chaney on December 3, 1984, the government stressed at that argument reasons for reversal that distinguish this case from the Chaney case.

ARGUMENT

The oral argument of Heckler v. Chaney distinguishes the instant case from Chaney. At its oral argument, the government stressed several points: first, the government stressed that Chaney involved judicial review of an investigative and enforcement decision, not unlike judicial review of the decision to bring a criminal prosecution. Second, and similarly, the government claimed that the decision of the United States Court of Appeals

for the District of Columbia, in Chaney, would establish a precedent of allowing the Food and Drug Administration to be forced into action merely by virtue of the filing of a citizen complaint. Third, the argument seemed to center on whether, as a threshold matter, the decision to enforce a portion of the Food and Drug laws is reviewable under the Administrative Procedure Act.

Irrespective of which way this Court resolves these issues, we respectfully submit that none of these issues are involved in the instant Falkowski case. The administrative decision reviewed in this case was not an enforcement decision of the type traditionally committed to agency discretion. Moreover, there is clearly "law to apply"--regulatory, statutory and constitutional--which controls the criteria by which the decision

to provide counsel to government employees is made. For this reason, as well, there is no threshold issue in this case as to whether the APA does apply.

CONCLUSION

For these reasons and the reasons set forth in the original Brief in Opposition and Supplemental Brief in Opposition, it is respectfully submitted that the Petition should not be granted.

Respectfully submitted,

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